

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2004-KA-02143-COA**

**ANTHONY TERRELL BOOKER A/K/A ROBERT  
BOOKER**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	5/20/2004
TRIAL JUDGE:	HON. DALE HARKEY
COURT FROM WHICH APPEALED:	JACKSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROSS PARKER SIMONS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. DANIEL HINCHCLIFF
DISTRICT ATTORNEY:	ANTHONY N. LAWRENCE, III
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTION OF CAPITAL MURDER. SENTENCED TO LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS.
DISPOSITION:	AFFIRMED: 08/29/2006
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE KING, C.J., GRIFFIS AND BARNES, JJ.**

**KING, C.J., FOR THE COURT:**

¶1. Anthony Terrell Booker was arrested on January 6, 2003 for the murder of Dorian Johnson. He was indicted by the Jackson County grand jury for capital murder on October 9, 2003. Convicted in a jury trial which commenced on May 17, 2004, Booker was sentenced to life imprisonment without the possibility of parole. Aggrieved, Booker appeals and asserts the following issues, which we quote verbatim:

**1. BARELY SIXTEEN YEARS AT THE TIME OF THE CRIME HE WAS CHARGED WITH, AND LIKELY RETARDED, MR. BOOKER WAS DENIED CONSIDERATION FOR A TRANSFER HEARING TO YOUTH COURT. THE STATUTES PERMIT IT AND IT WAS ERROR UNDER GARY V. STATE FOR THIS OPTION NOT TO BE CONSIDERED;**

**2. THE PROSECUTORS BLATANTLY VIOLATED BATSON BY MISREPRESENTING FACTS TO THE COURT AND WHEN THE TRIAL COURT WAS MADE AWARE OF THIS IT ERRED IN NOT GRANTING MR. BOOKER A NEW TRIAL;**

**3. MR. BOOKER WAS DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER THE MISSISSIPPI AND UNITED STATES CONSTITUTIONS;**

**4. THE TRIAL COURT ERRED IN DENYING MR. BOOKER'S MOTION TO SUPPRESS HIS STATEMENT AS IT WAS SECURED IN VIOLATION OF THE MISSISSIPPI AND UNITED STATES CONSTITUTIONS;**

**5. THE TRIAL COURT ERRED IN PERMITTING DR. MCGARRY TO RENDER IRRELEVANT AND HIGHLY PREJUDICIAL OPINIONS OUTSIDE HIS EXPERTISE AND NOT TENDERED IN DISCOVERY, THIS DESPITE A COURT ORDER SPECIFICALLY DESIGNED TO PREVENT THIS EVIDENTIARY BREACH;**

**6. THE TRIAL COURT ERRED IN ADMITTING THE PHOTOGRAPHS IN STATE'S EXHIBITS EIGHT AND NINE; AND**

**7. MR. BOOKER'S JURY WAS NOT SWORN WITH THE CAPITAL PETIT JURORS OATH AND HIS VERDICT IS UNLAWFUL AND UNCONSTITUTIONAL AS PER MISSISSIPPI SUPREME COURT DECISIONS.**

Finding no error, we affirm.

## **FACTS**

¶2. On December 30, 2002, Booker, Shawn Davis, Mary Scarbrough, and Desmond Shields were involved in the beating death of Dorian Johnson. At the urging of Scarbrough, Booker, Davis, and Scarbrough met Johnson at a park where they began beating and kicking him. After the beating, the trio placed Johnson in the back of his Jeep, and transported him to Vancleave. There the trio, now joined by Shields, continued the beating, and took Johnson's Jeep and wallet. After being reported

missing by his family, Johnson was found in Vancleave on January 6, 2003. Johnson's principal cause of death was determined to be severe blunt injuries to the head, although contributing causes included several severe cuts to his face and neck, broken ribs, and fluid build-up in his lungs. Booker, Davis, Scarbrough, and Shields were arrested January 6, 2003, and charged with Johnson's death. After filing a motion for severance on March 4, 2004, Booker was tried for his crime on May 17, 2004, and convicted and sentenced on May 20, 2004.

## **DISCUSSION**

### *1. Whether Booker should have been transferred to Youth Court.*

¶3. Booker was sixteen years-old at the time of Johnson's death and his indictment for capital murder. Booker was seventeen years-old when convicted of capital murder. Booker claims that because he had not reached the age of majority, had a low I.Q. score, and did not use a firearm in Johnson's murder, then his case should have been transferred to youth court. However, Booker's trial counsel failed to raise this issue before the trial court. A trial judge cannot be held in error for an issue that has not been presented to him for a decision at the trial level. *Milano v. State*, 790 So.2d 179, 189 (¶47) (Miss. 2001) (citing *Howard v. State*, 507 So.2d 58, 63 (Miss. 1987)). The appellate courts of Mississippi have no original jurisdiction, and can only hear questions tried and passed on by the court from which the appeal has been taken. *Id.* (citing *Patterson v. State*, 594 So.2d 606, 609 (Miss. 1992)). For this reason, this issue is not properly before this Court.

¶4. Even if the issue were not procedurally barred, it is without merit. Pursuant to Mississippi Code Annotated Section 43-21-151 (1)(a) (Rev. 2004), the circuit court has original jurisdiction over a child charged with capital murder. That Section reads:

(1) The youth court shall have exclusive jurisdiction in all proceedings concerning a delinquent child, a child in need of supervision, a neglected child, an abused child or a dependent child except in the following circumstances:

(a) Any act attempted or committed by a child, which if committed by an adult would be punishable under state or federal law by life imprisonment or death, will be in the original jurisdiction of the circuit court.

¶5. Because the circuit court had original jurisdiction over Booker, it was not required to consider alternative sentencing. *Flowers v. State*, 805 So.2d 654, 659 (¶14) (Miss. Ct. App. 2002). Therefore, this issue is without merit.

2. *Did the prosecution use its peremptory strikes in a manner which resulted in Batson violation.*

¶6. Booker, who is an African-American, claims that the trial court erred in accepting as race-neutral the reasons offered by the State for two of its four peremptory strikes against African-Americans on the venire. Pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), a defendant must establish a prima facie case of purposeful discrimination by proving:

1. that the defendant is a member of a cognizable racial group;
2. that the prosecution exercised peremptory challenges to remove from the venire members because of the defendant's race; and
3. that these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race.

*Id.* at 96. Once the defendant has established a prima facie case of discrimination, the state must provide a race-neutral reason for each strike. *Id.* at 98. The trial court then determines whether the defendant has established purposeful discrimination. *Id.*

¶7. Because four of the State's peremptory strikes were exercised against four of the five African-American veniremen, the trial court found that Booker had established a prima facie case of discrimination, and ordered the State to offer race-neutral reasons for each of the strikes. The two strikes with which Booker finds particular fault are those against Jurors 14 and 20.

¶8. With regards to Juror 14, the following discussion is contained in the record:

[PROSECUTOR]: Judge, the first *Batson* challenge arises with Juror Number 14 Chauncey Thompson. The State's race neutral reason, Judge, is that, in checking the

names of our jurors, we found that he has a marijuana conviction, a driver's licence violation, an insurance violation, a seat belt violation in Pascagoula. He was convicted on 2/5/03. And on those bases, especially the marijuana conviction, Judge, we didn't want a convicted marijuana holder on our jury.

....

THE COURT: And that information was verified through what source?

[PROSECUTOR]: Through the Pascagoula City Court.

[DEFENSE ATTORNEY]: We'd like a copy of it. Judge, he's a 29-year-old black male that works at Sears, Roebuck and Company and has a college education, and they want to kick him off. He was born and raised in this county.

THE COURT: Well, I find that the existence of that prior criminal history is sufficiently race-neutral to justify a peremptory challenge, a peremptory strike.

[DEFENSE ATTORNEY]: Judge, I'd like to see it.

THE COURT: If that information is available, Mr. Jones?

[PROSECUTOR]: Yes, sir. It's a matter of record with the Pascagoula Municipal Court. His conviction date is February the 5<sup>th</sup>, 2003. You can go get it.

[DEFENSE ATTORNEY]: Well, I mean, I don't have access to the Pascagoula Police Department.

[DISTRICT ATTORNEY]: We just called, Your Honor. That's how we got it, over the telephone.

....

[PROSECUTOR]: And I assure you we're not making that up, Judge.

¶9. The trial court accepted the State's representations, and struck Thompson from the jury. In arguing his motion for a new trial on August 13, 2004, Booker for the first time, contradicted the State's representations regarding Thompson. Booker produced an affidavit from Rhonda Diehl, the Pascagoula City Court Clerk, which stated that on the morning of May 17, 2004, she had informed Investigator Scott McIrath of the District Attorney's office that Chauncey Thompson, (Juror 14) had been charged with the four misdemeanors, as stated by the prosecution. However, Diehl indicated that she also told McIrath that all of the charges had been dismissed by the City because Thompson was not the person who had committed the offenses.

¶10. “A trial judge’s factual findings relative to a prosecutor’s use of peremptory challenges on minority persons are to be accorded great deference and generally will not be reversed unless they appear clearly erroneous or against the overwhelming weight of the evidence.” *Conerly v. State*, 544 So.2d 1370, 1372 (Miss. 1989) (citing *Lockett v. State*, 517 So.2d 1346, 1350 (Miss. 1987)). Further a trial judge can only rule on that which is before him when the ruling is made. Based upon the information then before the trial court, this Court cannot say that its decision on Chauncey Thompson was clearly erroneous or against the overwhelming evidence. However, the prosecutor’s actions are not above reproach. Giving false information to a judicial tribunal certainly calls for prosecutorial sanctions, but does not give rise to reversible error in this case.

¶11. The State’s reason for striking Juror 20, Alden Earl Stallworth, was that the prosecutor once had a contentious civil matter involving members of the Stallworth family. It was later discovered that the Stallworth on the venire panel was not a part of the Stallworth family that the prosecutor once represented. Nonetheless, the trial court found this to be a valid race-neutral reason. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed as race-neutral. *Gibson v. State*, 731 So.2d 1087, 1096 (¶27) (Miss. 1998).

¶12. This issue is without merit.

### *3. Was Booker denied the right to a speedy trial contrary to the Mississippi and United States Constitutions*

¶13. Booker claims that the trial court erred in denying his Motion to Dismiss for Failure to Grant a Speedy Trial on September 29, 2003. Booker argues that the period in excess of more than sixteen months between his arrest and date of trial, infringed upon his constitutional rights. The Supreme Court, in *Barker v. Wingo*, 407 U.S. 514 (1972), set forth a balancing test to analyze whether or not the state has violated the right of an accused to a speedy trial. That balancing test requires

consideration of the following factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the defendant was prejudiced by the delay. *Id.* at 530. These factors are closely related and must be considered together. *Id.* at 533.

#### *Length of delay*

¶14. The constitutional right to a speedy trial attaches at the time of arrest. *Smith v. State*, 550 So.2d 406, 408 (Miss. 1986). Booker was arrested on January 6, 2003, and trial began on May 17, 2004. Any delay in excess of eight months is considered presumptively prejudicial and requires a consideration of the other *Barker* factors. *Id.* Because there was a total of sixteen months between Booker's arrest and date of trial, this delay is presumptively prejudicial, and requires a consideration of the remaining *Barker* factors.

#### *Reasons for the delay*

¶15. The record does not reflect that any portion of the delay was caused by Booker. The State gives as the reasons for the delay the unavailability of the court and the time required to conduct an effective investigation. It includes in the latter the submission of evidence to the Mississippi Crime Lab for analysis, and the delay in receiving the completed reports. This Court has previously stated,

The inability to procure evidence vital to a proper completion of a criminal prosecution, as long as the evidence is pursued with some sort of reasonable measure of diligence, does not tend to establish the sort of bad faith delay tactics that call for the enforcement of the constitutional protections given under the Sixth Amendment.

*Moore v. State*, 837 So.2d 794, 798 (¶9) (Miss. Ct. App. 2003). The State has the obligation to bring a defendant to trial. For this reason we weigh this factor ever so slightly against the State.

#### *Whether the defendant asserted his right to a speedy trial*

¶16. A defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether he is being deprived of that right. *Barker*, 407 U.S. at 531-32. Before his indictment, Booker filed a motion to dismiss on September 3, 2003, which the trial court denied on September 29, 2003. However, motions to dismiss do not qualify as demands for speedy trial. *Perry v. State*, 637 So.2d 871, 875 (Miss. 1994). After his indictment, Booker made two demands for a speedy trial: one on February 10, 2004, and another on February 20, 2004, approximately eight months after he was indicted. Because Booker did make a demand for a speedy trial, this factor weighs ever so slightly in his favor.

### *Prejudice*

¶17. Booker claims to have been prejudiced by the state's delay in bringing him to trial. Among the specific instances of prejudice claimed by Booker are (1) he was incarcerated at age sixteen, (2) he slept on the floor of a cell block with some six or seven adults, and (3) he was not allowed to attend school. The responsibility to bring a defendant to trial rests upon the State. Therefore the burden of persuasion is on the State to show that any delay did not prejudice the defendant. *Anderson v. State*, 874 So.2d 1000, 1008 (¶ 34) (Miss. Ct. App. 2004). However, absent a showing of actual prejudice, this prong cannot weigh heavily in favor of the defendant. *Id.* Prejudice resulting from incarceration alone is not enough reason to find actual prejudice. *Jefferson v. State*, 818 So.2d 1099, 1108 (¶22) (Miss. 2002). Generally, proof of prejudice beyond incarceration includes such matters as the loss of evidence, death of witnesses, or staleness of the investigation. *Moore*, 837 So.2d at 799 (¶13). The possibility of impairment of the defense is the most serious and important consideration in determining whether the defendant suffered actual prejudice. *Id.* There is nothing in the record before this Court which even remotely suggests any impairment of Booker's defense. None of the witnesses for either the State or Booker were unavailable due to the delay in



his trial. There was also no claim of loss of evidence. Other than complaints of prejudice stemming from his incarceration, Booker has no claim of actual prejudice. Therefore, this factor weighs in favor of the State.

¶18. This Court's weighing of the *Barker* factors leads it to conclude that this issue is without merit.

#### *4. Trial court erred in admitting Booker's confession*

¶19. Booker argues that the trial court erred in admitting the videotaped confession which he gave to Sergeant Ken McClenic shortly after his arrest. Booker argues that the confession should not have been admitted because his statements were the result of promises from the officers and were given because of his limited learning capacity. Confessions are admissible only if they are voluntarily given and are not the result of promises, threats, or inducements. *Edwards v. State*, 856 So.2d 587, 594 (¶24) (Miss. Ct. App. 2003) (citing *Horne v. State*, 825 So.2d 627, 639 (¶43) (Miss. 2002)). Whether there has been an intelligent, knowing, and voluntary waiver of the right not to incriminate oneself is a factual issue to be determined by the trial judge from the totality of the circumstances. *Neal v. State*, 451 So.2d 743, 753 (Miss. 1984) (citing *Edwards v. Arizona*, 451 U.S. 477, 486 (1981)). The prosecution bears the burden of proving beyond a reasonable doubt that the confession was voluntary by introducing testimony from an officer, or other person having knowledge of the facts, that the confession was made without threats, coercion, or offer of reward. *Edwards*, 856 So.2d at 594 (¶24). Once the trial court has determined that the confession is admissible, the defendant bears a heavy burden of trying to overturn that decision on appeal. *Id.* (citing *Greenlee v. State*, 725 So.2d 816, 826 (¶26) (Miss. 1998)).

¶20. After signing a “waiver of rights” form read to him by Sergeant Richard Rader and Lieutenant Kim Versiga on January 6, 2003, Booker began to describe the events leading up to Johnson’s death. After finishing another confession, Sergeant McClenic then had Booker follow him into another room to have his confession videotaped. During the suppression hearing, Booker testified that Sergeant Rader promised him treatment as a youthful offender if he told the truth about what happened to Johnson. Sergeants Rader and McClenic, and Lieutenant Versiga all testified that Booker gave his confession voluntarily, and that he was not promised anything for his truthfulness. After questions arose about Booker’s limited learning capacity, all three again testified that Booker did not seem to have any problems understanding his rights, and that he signed the waiver of rights form willingly after his rights were read to him. At the hearing, Booker was able to read aloud for the court each right listed on the waiver. Although he claimed to not remember where he lived, or any of his teachers’ names, he acknowledged initialing the waiver in front of the officers.

¶21. All of the officers testified that no promises were made to Booker. Although Booker did offer evidence proving that he had a limited learning capacity, a confession will not be excluded merely because the person giving the confession is mentally weak. *Neal*, 451 So.2d at 756. Until it is shown that a weak-minded person has been overreached to the end that he has divulged that which he would not have divulged had he not overreached, his voluntary confession is admissible. *Id.* Given the totality of the circumstances, this Court cannot say that the trial court erred in admitting Booker’s videotaped confession into evidence.

*5. The trial court erred in permitting Dr. McGarry to express an opinion as to the victim’s pain*

¶22. Booker argues that because the death penalty was not sought in his case, testimony about the pain that the victim suffered was irrelevant and highly prejudicial. Dr. Paul McGarry, a forensic

pathology expert for the State, testified as to Johnson's cause of death. When asked whether Johnson suffered a painful death, Dr. McGarry testified Johnson became unconscious sometime before his death, but that during the infliction of the injuries, Johnson was "very much aware of what was going on, and in great pain." The supreme court has previously held that discussion of pain by a forensic pathologist is admissible. *Davis v. State*, 743 So.2d 326, 345 (¶53) (Miss. 1999). Therefore, the trial court did not err in admitting that testimony.

¶23. Booker also claims that the testimony was in violation of discovery rules. The Uniform Circuit and County Court Rule 9.04 (A)(4) requires that the prosecution disclose to the defendant and his attorney a copy of any reports, statements, or opinions of experts. Prior to the beginning of trial, the court ordered the prosecution to supplement discovery as to any of Dr. McGarry's opinions not fully contained within the autopsy report. Booker claims that Dr. McGarry's testimony about Johnson's pain was not included in the report, and should be excluded as a discovery violation. Although there is no indication that Dr. McGarry's testimony was outside the scope of his report, discovery violations are only reversible when there is a clear showing of prejudice. *McCoy v. State*, 811 So.2d 482, 483 (¶15) (Miss. Ct. App. 2002). Because Dr. McGarry's statements were otherwise admissible, and Booker offers no proof of any real discovery violation, this issue is without merit.

*6. The trial court erred in admitting gruesome photographs of the victim*

¶24. Booker argues that the trial court erred in admitting into evidence two rather gruesome photographs. He claims that the photos were prejudicial, and had no real probative value. Admissibility of gruesome crime scene photographs is within the sound discretion of the trial court. *Randolph v. State*, 852 So.2d 547, 566 (¶62) (Miss. 2002) (citing *Chatman v. State*, 761 So.2d 851, 854 (¶11) (Miss. 2001). Reversal of the trial judge's decision will only occur where there is a clear abuse of discretion. *Id.* The decision to admit gruesome photographs "runs toward almost unlimited

admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value.” *Id.* (citing *Spann v. State*, 771 So.2d 883, 895 (¶29) (Miss. 2000)). Photographs are deemed to have evidentiary value if admitted to: (1) aid in describing the circumstances of the killing, (2) aid in describing the location of the body and cause of death, and (3) supplement or clarify witness testimony. *Id.*

¶25. In the case *sub judice*, Booker claims that the photographs were prejudicial and only inflamed the jury because they showed the mutilated back of Johnson’s head, as well as Johnson’s mutilated face. In admitting the photographs, the trial court cited to their relevancy to the cause of Johnson’s death and the crime scene investigation. Such a decision is not error. Therefore, this issue is without merit.

*7. No capital petit jurors’ oath was given to the jurors after voir dire*

¶26. Booker claims that his jurors did not receive the proper capital petit jurors’ oath. Although the record does not state that an oath was given, the sentencing order states that the jury was duly sworn. This Court has previously held that when the record does not show that the jurors were sworn, but the sentencing order reads that jurors were sworn, a rebuttable presumption exists that the trial judge properly performed his/her duties. *Stewart v. State*, 881 So.2d 919, 923 (¶13) (Miss. Ct. App. 2004). However, when no objection is made by the defendant about failing to specially swear in the jury until after a verdict has been rendered, the issue cannot be heard on appeal. *Id.* Therefore, this issue is both procedurally barred, and without merit.

**¶27. THE JUDGMENT OF THE JACKSON COUNTY CIRCUIT COURT OF CONVICTION OF CAPITAL MURDER AND SENTENCE TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE IN THE CUSTODY OF THE MISSISSIPPI**

**DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO JACKSON COUNTY.**

**LEE AND MYERS, P.JJ., SOUTHWICK, IRVING, CHANDLER, GRIFFIS, BARNES AND ROBERTS, JJ., CONCUR. ISHEE, J., NOT PARTICIPATING.**